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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 583

LONAS RAY CAUGHORN,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
*Counsel for Petitioner.*

L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Lonas Ray Caughorn prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on October 17, 1960.

## OPINION BELOW.

The District Court did not render a written opinion. The judgment of the Court of Appeals for the Sixth Circuit is annexed hereto as an Appendix, on page A1.

## JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 17, 1960. Extensions of time within which to file this petition for writ of certiorari were granted by orders of Mr. Justice Potter Stewart to and including December 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

## QUESTIONS PRESENTED.

(1) Did the District Court err in failing to grant petitioner's motion to dismiss the indictment?

(2) Did the District Court err in refusing to grant petitioner's motion for a verdict of acquittal?

(3) Did the District Court err in charging the jury as follows:

> "* * * I say, this contract purports to be between the Department of Justice and the Knox County jail officials, whereby, briefly stated, Knox County authorities agree for federal prisoners to be handled in the Knox County jail at so much per diem, and in that connection the Court charges you that a person is committed to the Knox County jail under a lawful order of a federal district having authority to issue such an order to the Knox County jail, then the person

who is committed is in the custody of the Federal Government and is in the custody of the Attorney General of the United States.

"Finally, he is being held by the present sheriff, E. B. Bowles, and his deputies, charged with a federal offense, being held on the charge of a federal offense, and is in custody of the United States Government."

(4) Did the District Court err in charging the jury, over the objection of petitioner's counsel, as follows:

"The Court: Ladies and gentlemen, the warrant which refers to the alleged Dyer Act charge is not pertinent for any purpose in this case except for whatever bearing it may have, if any, on the question of whether or not this defendant was in federal custody at the time he allegedly escaped from federal custody. You will only consider that paper as bearing on that question and no other; in other words, don't allow that paper to prejudice his rights, the rights of this defendant as to whether or not he is guilty or not guilty of the charge contained in this indictment. You may look to it as bearing on the question of whether he was in federal custody at the time he allegedly escaped from the Knox County jail."

(5) Did the District Court err in charging the jury, over the objection of petitioner's counsel, as follows:

"The Court: The Court charges the jury that if the Attorney General of the United States designates the marshal to take charge of a prisoner and at the same time directs him to put the prisoner in the Knox County jail, under a contract, then the Knox County jail is a representative of the Attorney General of the United States, and the prisoner is in custody in jail."

(6) Did the District Court err in refusing the request of petitioner's counsel to charge the jury as follows:

"Mr. Badgett: I would like for your Honor to charge that if he was not confined under a lawful order or process, that he would not be in the custody of the Attorney General and could not be guilty of the escape."

(7) Did the District Court err in failing and refusing to charge the jury the request made by petitioner's counsel, as follows:

"Mr. Badgett: I would like your Honor to charge that before he can be guilty under this indictment he would have to have escaped from legal custody."

## STATUTES INVOLVED.

Title 18, U.S.C., Section 751. *Prisoners in custody of institution or officer.*

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, U.S.C., Section 1073. *Flight to avoid prosecution or giving testimony.*

"Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement."

## RULE INVOLVED.

### Federal Rules of Criminal Procedure.

Rule 40. *Commitment to Another District; Removal.*

* * *

(b) ARREST IN DISTANT DISTRICT.

(1) *Appearance before Commissioner or Judge.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) *Statement by Commissioner or Judge.* The commissioner or judge shall inform the defendant of

the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) *Hearing and Removal on Arrest without a Warrant.* If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense was committed is presented."

## STATEMENT.

Petitioner was indicted November 23, 1959, in the Eastern District of Tennessee, Northern Division, in one count, charging a violation of Title 18, U.S.C., Section 751, in that he did in that jurisdiction allegedly escape from the custody of the Attorney General of the United States and his authorized representatives while he was being held in custody by virtue of an arrest on a charge of violation of Title 18, U.S.C., Section 1073, "a felony".

Petitioner received the maximum sentence, to-wit: five years, and is now incarcerated in Alcatraz.

## SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) It was not error for the District Court to refuse to grant petitioner's motion to dismiss the indictment;

(2) It was not error for the District Court to refuse to grant petitioner's motion for a verdict of acquittal;

(3) It was not error for the District Court to charge the jury as follows:

"* * * I say, this contract purports to be between the Department of Justice and the Knox County jail

officials, whereby, briefly stated, Knox County authorities agree for federal prisoners to be handled in the Knox County jail at so much per diem, and in that connection the Court charges you that a person is committed to the Knox County jail under a lawful order of a federal district having authority to issue such an order to the Knox County jail, then the person who is committed is in the custody of the Federal Government and is in the custody of the Attorney General of the United States.

"Finally, he is being held by the present sheriff, E. B. Bowles, and his deputies, charged with a federal offense, being held on the charge of a federal offense, and is in custody of the United States Government."

(4) It was not error for the District Court to charge the jury, over the objection of petitioner's counsel, as follows:

"The Court: Ladies and gentlemen, the warrant which refers to the alleged Dyer Act charge is not pertinent for any purpose in this case except for whatever bearing it may have, if any, on the question of whether or not this defendant was in federal custody at the time he allegedly escaped from federal custody. You will only consider that paper as bearing on that question and no other: in other words, don't allow that paper to prejudice his rights, the rights of this defendant as to whether or not he is guilty or not guilty of the charge contained in this indictment. You may look to it as bearing on the question of whether he was in federal custody at the time he allegedly escaped from the Knox County jail."

(5) It was not error for the District Court to charge the jury, over the objection of petitioner's counsel, as follows:

"The Court: The Court charges the jury that if the Attorney General of the United States designates

the marshal to take charge of a prisoner and at the same time directs him to put the prisoner in the Knox County jail, under a contract, then the Knox County jail is a representative of the Attorney General of the United States, and the prisoner is in custody in jail."

(6) It was not error for the District Court to refuse the request of petitioner's counsel to charge the jury as follows:

"Mr. Badgett: I would like for your Honor to charge that if he was not confined under a lawful order or process, that he would not be in the custody of the Attorney General and could not be guilty of the escape."

(7) It was not error for the District Court to fail and refuse to charge the jury the request made by petitioner's counsel, as follows:

"Mr. Badgett: I would like your Honor to charge that before he can be guilty under this indictment he would have to have escaped from legal custody."

## REASONS FOR GRANTING WRIT.

The questions presented here are substantial and are of widespread importance, in that we have found no decisions of any appellate court on the questions. There is one decision, to-wit: *United States* v. *Punchsak*, 146 F. Supp. 523, by the District Court of Alaska which holds directly contrary to the decision of the United States Court of Appeals for the Sixth Circuit in this case.

All of the questions presented evolve into one single issue, which is: *can one who is not in legal custody of the Attorney General of the United States be convicted of escape from the custody of the United States in violation of Title 18, U.S.C., Section 751?*

Motion was made to dismiss the indictment on the ground that the records of the United States District Court for the Eastern District of Tennessee show that at the time petitioner is alleged to have escaped from the custody of the Attorney General of the United States and his authorized representatives, petitioner was not legally in arrest on a charge of violating Title 18, U.S.C., Section 1073, but was being illegally and unlawfully restrained of his liberty and was not in legal custody of the Attorney General of the United States. Motion for a verdict of acquittal was made on the same ground. Both motions were overruled.

The records of the District Court Clerk's office for the Eastern District of Tennessee, and the proof, showed the following:

No warrant was ever issued by a United States Commissioner or a federal judge in the Eastern District of Tennessee for a violation of Title 18, U.S.C., Section 1073. Agents of the Federal Bureau of Investigation arrested petitioner in Knoxville, Tennessee, without a warrant, but on information that a complaint had been issued in Atlanta, Georgia, charging petitioner with unlawful flight (Title 18, U.S.C., Section 1073), to escape imprisonment on the State of Georgia's charge of robbery. No such warrant was ever served upon petitioner. The United States Commissioner at Knoxville, Tennessee, went to the Knox County jail where agents of the F.B.I. had placed petitioner, and petitioner waived a hearing. The United States Commissioner at Knoxville, Tennessee, made no report to the United States District Judge for the Eastern District of Tennessee of the waiver, but instead the Commissioner wrote up a commitment which directed the United States Marshal for the Eastern District of Tennessee "to take custody of the defendant and commit him with a certified copy of the commitment to the custodian of a place of confinement within

the Eastern District of *Georgia* (emphasis ours) approved by the Attorney General of the United States, where the defendant shall be received and safely kept until discharged in due course of law".

Subsequently, petitioner was charged with a violation of the Dyer Act in the Eastern District of Tennessee and given a commissioner's hearing at Knoxville, but no commitment was issued by the Commissioner at Knoxville because, as he testified, he considered petitioner already to be in lawful arrest on the unlawful flight charge.

Petitioner was held on this illegal and unlawful commitment issued by the United States Commissioner for the Eastern District of Tennessee, from the time of his arrest on February 25, 1959, until he left the Knox County jail at Knoxville, Tennessee, on May 6, 1959.

At the time petitioner is alleged to have escaped the Knox County jail, at Knoxville, Tennessee, and committed the alleged violation with which this petition is concerned, he was being illegally and unlawfully restrained of his liberty for the following reasons:

(a) No warrant charging unlawful flight (Title 18, U.S.C., Section 1073) was ever served on petitioner.

(b) Under Rule 40, Federal Rules of Criminal Procedure, the United States Commissioner for the Eastern District of Tennessee had no right to commit petitioner for transfer to a place of confinement in the State of Georgia. Under this rule, only a district judge may issue a removal warrant.

(c) No removal warrant was ever issued by the District Judge of the Eastern District of Tennessee ordering petitioner's removal to Georgia.

(d) Petitioner was not in legal custody on the alleged Dyer Act violation because no commitment was ever issued by the United States Commissioner.

(e) Even if the United States Commissioner's commitment were valid, which, of course, it could not be, petitioner was not committed to the Knox County jail at Knoxville, Tennessee, from where he is charged to have escaped.

(f) The District Judge of the Eastern District of Tennessee could not have issued a removal warrant to Georgia under Rule 40, Federal Rules of Criminal Procedure, because no warrant from a district court in Georgia was ever presented before petitioner is charged with escaping the Knox County jail at Knoxville, Tennessee.

Under the facts of this case, the government must concede that the petitioner was not in the legal custody of the Attorney General when he is alleged to have escaped. Petitioner's position is that to sustain a conviction he must have been in the legal custody of the Attorney General of the United States under the provisions of Title 18, U.S.C. Section 751.

The only case we can find on the question is the case of *United States* v. *Punchsak*, 146 F. Supp. 523, wherein the District Court said:

> "I am of the opinion that the law is fairly well established that physical and legal custody are two different matters as far as a violation of 18 U.S.C. 751 is concerned. Giles v. U. S., (9 C.C.A. 1946) 157 F.2d 588. The appellate court established in this case that one could be in legal custody of the Attorney General when he was not in actual physical custody. It is just as reasonable to hold that one could be in the physical custody of the Attorney General without being in his legal custody."

In that case, the court discharged the defendant by holding that although he was in the physical custody of the Attorney General he was not in his legal custody.

The government will probably cite in the instant case, *Godwin* v. *United States*, (C.C.A. 8, 1950) 185 F.2d 411, and *Bayless* v. *United States*, (C.C.A. 9, 1944) 141 F.2d 578, to sustain its position. These cases hold that one cannot test the propriety of his confinement by forceably escaping. These cases are distinguishable on the facts from the instant case, because in those cases the escapee was in the custody of the Attorney General under legal process, which is not the fact in the instant case. If the government insists here that one cannot test the propriety of his confinement by escaping, that would beg the question. The question is whether having escaped when *not* in legal custody, can the escapee be punished under the provisions of Title 18, U.S.C., Section 751?

## CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
*Counsel for Petitioner.*